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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

KYLE ALEXANDER ALLISON,

Defendant and Appellant.

D075152

(Super. Ct. No. RIF1502181)

APPEAL from a judgment of the Superior Court of Riverside County, Mac R. Fisher, Judge. Reversed and remanded.

Edward J. Haggerty, under appointment by the Court of Appeal for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael P. Pulos, Seth M. Friedman, and Nora S. Weyl, Deputy Attorneys General for Plaintiff and Respondent.

Kyle Alexander Allison appeals a judgment of conviction after he was found guilty of one count of oral copulation with a person 10 years of age or younger

(Pen. Code,¹ § 288.7, subd. (b)) and sentenced to a mandatory indeterminate prison sentence of 15 years to life. He contends the prosecutor engaged in prosecutorial misconduct during closing arguments by making disparaging remarks to the jury about him. He argues the prosecutor committed further prosecutorial misconduct by repeatedly advising the jury his defense counsel had perpetrated an "overwhelming perversion of justice" during closing arguments. Alternatively, he claims his trial counsel was ineffective for failing to object to these inflammatory statements.

We conclude Allison forfeited his prosecutorial misconduct arguments by failing to object in the trial court. However, we agree with him that the prosecutor's incendiary statements regarding his trial counsel's character were improper; an objection to those statements would have been meritorious had it been interposed; and there was no rational, tactical, or strategic purpose for his trial counsel's failure to object. We further conclude there was a reasonable probability that, but for his trial counsel's failure to object, Allison would have obtained a more favorable result. We therefore reverse the judgment.

BACKGROUND

A. *The Incident*

Allison was a close friend of Anthony S. and his wife Dana S. He was so close with Anthony and Dana, particularly Anthony, that Anthony and Dana's children referred to him as Uncle Kyle. Allison even moved from his mother's residence into Anthony and

¹ Further statutory references are to the Penal Code unless otherwise noted.

Dana's residence. Allison slept in the living room and Anthony and Dana's oldest child, five-year-old Jane Doe (Jane),² shared a bedroom with her brother.

Shortly after Allison moved in with Anthony and Dana, Dana and Jane attended a family gathering. Dana was seated with Anthony's father when Jane approached and said she needed to tell Dana something. Jane disclosed that Allison had done "nasty" things to her and had licked her " 'peepee.' " Dana asked Jane if she was sure and Jane replied, "yes." Dana asked Jane when the incident had occurred and Jane replied, " [l]ast morning.' " At the time of the incident, Allison was 25 years old.

B. *Trial*

The district attorney charged Allison with two counts of oral copulation with a person 10 years of age or younger. After trial, the jury was unable to reach a verdict and the trial court declared a mistrial. On the prosecutor's motion, the court dismissed one of the charged counts and the case proceeded to a retrial on the remaining count.

1. *The Prosecution Case*

On retrial, the prosecution elicited testimony from Dana regarding her conversation with Jane at the family gathering. Dana testified, as noted *ante*, that Jane told her Allison had done "nasty" things to her and had licked her " 'peepee.' " According to Dana, Jane appeared upset while confiding in her about the sexual assault. The prosecution also elicited testimony from Anthony's father regarding Jane's reporting of

² We identify Anthony and Dana's daughter by the pseudonym Jane Doe, as used by the parties, to protect her privacy interests. (*Doe v. Univ. of Southern California* (2018) 29 Cal.App.5th 1212, 1214, fn. 1; Cal. Rules of Court, rule 8.90(b)(4).)

the incident. Anthony's father testified that he did not hear Jane's statements to Dana, but he noticed Dana was crying and asked Jane what was going on. He testified that Jane responded in a "somber" and "quiet" tone that Allison had touched her "private parts."

Jane, who was seven years old at the time of trial, testified that the incident occurred the same day as the family gathering. She testified that she was lying on a trundle bed in her bedroom, wearing pajamas, and watching a movie with Allison when Allison pulled down her pajama pants and underpants and licked her "middle private part" in "the front." Jane testified that it made her feel "gross" when Allison licked her and she felt "grossed out" and "a little scared" recalling the incident. Jane testified about a second instance of sexual assault as well. According to Jane, Allison made Jane touch his "boy middle part," or his "squishy thing," one day before he licked her vagina.

2. The Defense Case

A key defense theme at trial was that there was marital strife between Anthony and Dana preceding Jane's reporting of the sexual assault because Dana believed Anthony was spending too much time with Allison. According to the defense, Jane internalized this marital strife and formed false memories about the alleged incident—i.e., she incorporated information from family members, the media, or other sources into her memory and honestly, but incorrectly, believed she was a sexual assault victim.

For instance, multiple witnesses, including Dana and Allison, testified that Anthony and Allison spent almost every day together, Dana was frustrated by how much time Anthony spent with Allison, and Dana and Anthony regularly fought about Anthony's prioritization of Allison over his family. Allison and Dana testified about a

particularly heated argument between Anthony and Dana about Allison, in which they screamed at one another while Allison and Jane were present. According to Allison, Anthony and Dana pushed one another and Dana threw a cutting board that smashed against the wall and struck their youngest child. Allison testified that after this fight, Jane repeatedly told Allison he was "taking her daddy away from her," and he needed to leave. Allison denied touching Jane's vagina or asking her to touch his penis.

3. Closing Arguments

The prosecutor devoted most of her closing argument trying to bolster Jane's credibility as a witness. For example, she emphasized Jane's contemporaneous reporting of the alleged sexual assault, as well as the consistencies between Jane's initial reporting and her trial testimony. The prosecutor also spent some of her closing argument attacking Allison's veracity. She called him "a liar," claimed he would "lie to get out of trouble," and argued, "You can't trust anything he says." She also described Allison as a freeloader who caused conflict, including in statements referring to him as a "chaotic deadbeat" who drank beers and partied with Anthony, moved into Anthony and Dana's home, and stayed with them despite "knowing it was going to cause a big fight."

During the defense's closing argument, Allison's trial counsel attacked Jane's credibility on multiple grounds, including by emphasizing her age, trial testimony indicating domestic conflict can be associated with the formation of false memories, Jane's purported lack of source memory, and certain inconsistencies between Jane's trial testimony and her initial reporting of the incident. In connection with the attack on Jane's credibility, Allison's trial counsel referred to an instruction with which the trial court had

charged the jury (CALCRIM No. 301), which provided that the testimony of one witness can prove any fact. Then, he stated as follows: "[Y]eah, there's a jury instruction that says one witness is enough. Which there is. And there are circumstances in which that should be enough. This isn't one of them."

After the defense completed its closing argument, the prosecutor gave a closing rebuttal argument that began as follows: "The overwhelming perversion of justice by that defense team literally almost leaves me speechless for all of you. The defense has all but said directly to you, don't follow the law and assume a ton of facts that were never before you. [¶] It's so offensive. And so I'm going to take a moment to calm down." She continued: "There's a reason, ladies and gentlemen, we talked extensively about, at the end of the day, you must follow Judge Fisher's law. Not what [defense counsel] wants you to believe or what law he wants you to follow. [¶] Because he just told you that there's times when we have the one witness is enough law. And you can consider that. But you must not consider it in this case. That's offensive. I'd like to know any defense attorney who comes before a jury and tells them, don't follow the law the judge just read to you. That's a perversion of justice." Allison's trial counsel did not object to these statements.

4. *Verdict*

The jury convicted Allison of the charged offense of engaging in oral copulation with a child 10 years of age or younger. Pursuant to section 288.7, subdivision (b), the trial court imposed a mandatory indeterminate prison sentence of 15 years to life.

DISCUSSION

Allison contends the prosecutor engaged in prosecutorial misconduct by making derisive remarks about him and impugning the integrity of his trial counsel during closing arguments. In particular, he challenges the prosecutor's statements portraying him as "a liar" and a "deadbeat." Further, he alleges prosecutorial misconduct based on the prosecutor's comments that his trial counsel perpetrated an "overwhelming perversion of justice." Alternatively, he claims his counsel rendered ineffective assistance by failing to object to the prosecutor's statements. The People respond that Allison forfeited his prosecutorial misconduct arguments, the prosecutor's statements did not amount to prosecutorial misconduct, and there is no reasonable likelihood the jury would have reached a more favorable verdict in the absence of the alleged misconduct.

A. *Forfeiture*

"As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.) Time and again, the Supreme Court has invoked this rule of forfeiture to reject prosecutorial misconduct claims based on statements made in closing arguments. (See, e.g., *People v. Powell* (2018) 6 Cal.5th 136, 171; *People v. Winbush* (2017) 2 Cal.5th 402, 481 (*Winbush*); *People v. Seumanu* (2015) 61 Cal.4th 1293, 1359-1360 (*Seumanu*); *People v. Shazier* (2014) 60 Cal.4th 109, 145 (*Shazier*); *People v. Young* (2005) 34 Cal.4th 1149, 1188 (*Young*).)

Allison urges us not to apply the rule of forfeiture on grounds that the prosecutorial misconduct at issue was "egregious." (*People v. Hill* (1998) 17 Cal.4th 800, 820-822 [no forfeiture where prosecutor engaged in "constant barrage" of unethical conduct producing "poisonous" atmosphere].) However, a defendant claiming an exception to the rule of forfeiture must find support for it in the record. (*People v. Pettie* (2017) 16 Cal.App.5th 23, 74; *Seumanu, supra*, 61 Cal.4th at p. 1336.) Allison has not substantiated his claim with reasoned argument or record support establishing that an objection would have been futile. In the absence of such substantiation, we conclude Allison's prosecutorial misconduct arguments are forfeited.

B. *Ineffective Assistance of Counsel*

1. *Legal Standards*

"Under both the Sixth Amendment to the United States Constitution and article I, section 15, of the California Constitution, a criminal defendant has the right to the assistance of counsel. [Citations.] The ultimate purpose of this right is to protect the defendant's fundamental right to a trial that is both fair in its conduct and reliable in its result. [Citations.] [¶] Construed in light of its purpose, the right entitles the defendant not to some bare assistance but rather to *effective* assistance." (*People v. Ledesma* (1987) 43 Cal.3d 171, 215.) "In determining whether counsel's performance was deficient, a court must in general exercise deferential scrutiny." (*Id.* at p. 216.) However, "[Deference] is not abdication" [citation]; it must never be used to insulate counsel's performance from meaningful scrutiny and thereby automatically validate challenged acts

or omissions. Otherwise, the constitutional right to the effective assistance of counsel would be reduced to form without substance." (*Id.* at p. 217.)

Under the well-established standard used for ineffective assistance claims, a defendant alleging ineffective assistance must establish two elements: "(1) counsel's performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel's deficient representation prejudiced the defendant, i.e., there is a 'reasonable probability' that, but for counsel's failings, defendant would have obtained a more favorable result." (*People v. Dennis* (1998) 17 Cal.4th 468, 540; *Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.)

2. Reasonableness of Counsel's Conduct

As noted *ante*, Allison contends his counsel rendered deficient performance by failing to object to the prosecutor's statements about Allison and his trial counsel during closing arguments. To assess whether the failure to object was reasonable, we begin by considering the propriety of the prosecutor's statements.

As a matter of state law, a prosecutor engages in misconduct if he or she uses "deceptive or reprehensible methods to attempt to persuade either the trial court or the jury." (*People v. Morales* (2001) 25 Cal.4th 34, 44.) During closing arguments, "[a] prosecutor may 'vigorously argue his case and is not limited to 'Chesterfieldian politeness' ' [citation], and he may 'use appropriate epithets warranted by the evidence.' " (*People v. Fosselman* (1983) 33 Cal.3d 572, 580.) However, prosecutorial misconduct may arise when a prosecutor exceeds the bound of vigorous arguments and instead "inflame[s] the passions of the jury." (*People v. Zambrano* (2004) 124 Cal.App.4th 228,

242; *People v. Redd* (2010) 48 Cal.4th 691, 742 ["It is, of course, improper to make arguments to the jury that give it the impression that "emotion may reign over reason," and to present "irrelevant information or inflammatory rhetoric that diverts the jury's attention from its proper role, or invites an irrational, purely subjective response." ' '"].)

In this case, the prosecutor's statements regarding Allison do not transgress the ethical line into prosecutorial misconduct. The first category of challenged statements describes Allison as a "a liar" and warns the jury, "You can't trust anything he says." However, "[a] prosecutor may honestly urge that a defendant lied. Convincing the jury that he did so is a potent weapon." (*People v. Armstrong* (2019) 6 Cal.5th 735, 797; *Shazier, supra*, 60 Cal.4th at p. 146 ["Harsh and colorful attacks on the credibility of opposing witnesses are permissible if fairly based on the evidence."].) Indeed, the prosecution elicited testimony from Allison himself in which he admitted to prior instances of dishonesty. In light of the evidence impeaching Allison's veracity, the prosecutor's comments fall within a prosecutor's wide latitude to comment on the evidence during closing argument.

The second set of challenged statements—portraying Allison as a "chaotic deadbeat" who drank, partied, and lived in Anthony and Dana's home despite the ensuing marital conflict—were also permissible. "Prosecuting attorneys are allowed "a wide range of descriptive comment" and their " "argument may be vigorous as long as it amounts to fair comment on the evidence, which can include reasonable inferences, or deductions to be drawn therefrom." ' ' ' ' ' (*People v. Jackson* (2016) 1 Cal.5th 269, 349.) As noted *ante*, a key issue at trial was the disruptive impact Allison had on Anthony and

Dana's family life. During opening statements, the defense argued the marital relationship was in "turmoil" because Anthony and Allison spent so much time "drinking, hanging out and partying out in the garage." Later, Allison testified Dana resented the amount of time Anthony and Allison spent lounging in the garage, playing video games, and partying. In view of this evidence and the trial themes of the defense, the prosecutor's statements did not exceed the bounds of proper argument.

However, Allison alleges prosecutorial misconduct based not only on the prosecutor's statements about him, but also her statements about his counsel. As discussed *ante*, the prosecutor informed the jury his counsel committed an "overwhelming perversion of justice" that left her "speechless," characterized the defense counsel's closing argument as an "offensive" admonition to the jury to disregard the law, and then repeated her claim that defense counsel had perverted justice.

" ' "A prosecutor commits misconduct if he or she attacks the integrity of defense counsel, or casts aspersions on defense counsel." ' " (*Shazier, supra*, 60 Cal.4th at p. 150.) " 'Such attacks on counsel's credibility risk focusing the jury's attention on irrelevant matters and diverting the prosecution from its proper role of commenting on the evidence and drawing reasonable inferences therefrom.' " (*Winbush, supra*, 2 Cal.5th at p. 484.) " 'In addressing a claim of prosecutorial misconduct that is based on the denigration of opposing counsel, we view the prosecutor's comments in relation to the remarks of defense counsel, and inquire whether the former constitutes a fair response to the latter.' " (*People v. Pearson* (2013) 56 Cal.4th 393, 431-432.)

The prosecutor's comments regarding Allison's trial counsel transgress the governing standards just discussed and amount to a clear example of prosecutorial misconduct. The prosecutor directly impugned defense counsel's integrity by unjustifiably intimating that he breached his ethical obligations, instructed the jury to disregard the law, and informed the jury to follow his own version of the law. Even worse, the prosecutor claimed—not once, but twice—that defense counsel perpetrated a "perversion of justice" in his representation of Allison. The term "perversion of justice" is undoubtedly a loaded one under any circumstance. But it carries particular significance in the context of this case, where the underlying criminal charge against Allison was that he engaged in sexually perverse acts against a child. Such innuendo-laden comments strike directly at the heart of defense counsel's integrity and, therefore, are impermissible. (*Young, supra*, 34 Cal.4th at p. 1189.)

The People claim the prosecutor's statements were necessary because defense counsel had misinstructed the jury about whether it could rely on a single witness's testimony to prove a fact. However, defense counsel did not misstate the law during its closing arguments. After reminding the jury about the instruction that the testimony of one witness can prove any fact (CALCRIM No. 301), defense counsel stated the testimony of the key witness in *this* case (Jane) was insufficient to prove the facts alleged due to her purported lack of credibility. There was nothing improper or misleading about this type of argument. Nor did defense counsel advise or intimate to the jury that it should disregard the trial court's jury instructions. Therefore, the prosecutor's statements cannot be viewed as a fair or reasonable response to defense counsel's closing arguments.

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel [citation], and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' " (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.) Further, we are mindful that " 'mere failure to object to argument seldom establishes counsel's incompetence.' " (*Id.* at p. 492; see *People v. Riel* (2000) 22 Cal.4th 1153, 1202 ["Whether to object at trial is among 'the minute to minute and second to second strategic and tactical decisions which must be made by the trial lawyer during the heat of battle.' "].)

However, we believe this appeal falls into the rare category of cases in which counsel's failure to object simply cannot be considered a tactical or strategic decision. (*People v. Roberts* (2011) 195 Cal.App.4th 1106, 1131-1132 [collecting cases in which failure to object constituted ineffective assistance]; *People v. Anzalone* (2006) 141 Cal.App.4th 380, 396 [counsel was ineffective for failing to object to misstatements of law].) For the reasons discussed *ante*, an objection challenging the prosecutor's statements would have had substantial merit. Those statements were particularly damaging to Allison, as they targeted the veracity of his trial counsel and suggested he had violated his ethical duties by advising the jury to misapply the law. Perhaps most damaging of all, they repeatedly informed the jury that defense counsel had engaged in an "overwhelming perversion of justice" in a case involving sexual perversion. We can discern no tactical decision for failing to object to these highly prejudicial statements, nor could the People articulate such a reason when questioned to do so at oral argument.

Therefore, we conclude Allison's trial counsel failed to provide effective assistance of counsel.

3. *Prejudice*

For many of the same reasons just discussed, we conclude there is a reasonable probability that, but for counsel's failings, Allison would have obtained a more favorable result. (*Dennis, supra*, 17 Cal.4th at pp. 540-541.) In particular, the prosecutor's repeated claims that defense counsel perverted justice invited the jury to render a verdict of guilt based on the alleged misconduct of Allison's counsel. No objection from defense counsel or sua sponte admonition from the trial court followed these statements, which were made during the closing rebuttal argument immediately prior to jury deliberations. On this record, we conclude trial counsel's ineffective assistance was prejudicial.³

³ Because we conclude reversal is warranted due to the deficient performance of Allison's trial counsel, we do not address Allison's remaining contentions on appeal.

DISPOSITION

The judgment is reversed and the cause is remanded to the trial court. Because we reverse due to prosecutorial misconduct and ineffective assistance of defense counsel, a copy of this opinion will be sent to the State Bar of California. (Bus. & Prof. Code, § 6086.7, subd. (a)(2).)

GUERRERO, J.

WE CONCUR:

O'ROURKE, Acting P. J.

DATO, J.